BUSTING THE HART & WECHSLER PARADIGM

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Federal Courts law was once a vibrant area of scholarship and an essential course for intellectually ambitious students. Now its prestige has diminished so much that scholars debate its future in a recent issue of the *Vanderbilt Law Review*, where even one of its champions calls it (albeit in the subjunctive mood) a "scholarly backwater."[1] What, if anything, went wrong, and what should Federal Courts scholars do about it? In his contribution to the Vanderbilt symposium, Richard Fallon defends the reigning model of Federal Courts law, an approach to jurisdictional issues that dates from the publication in 1953 of Henry Hart and Herbert Wechsler's casebook, *The Federal Courts and the Federal System*.[2] In Fallon's view, nothing went wrong, and in any event there is not much we can do about it. In brief, Fallon argues that with a few adjustments, Federal Courts scholars should continue to work within the model set out by Hart & Wechsler forty years ago, a model that rests upon "the principles and policies underlying federalism and the separation of powers,"[3] and such process

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1. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 Vand. L. Rev. 953, 976 (1994) ("*Reflections*") ("If Federal Courts is a scholarly backwater it is a backwater with an important place in the ecosystem of public law scholarship.") The other contributors to the issue are Ann Althouse, *Late Night Confessions in the Hart & Wechsler Hotel*, 47 Vand. L. Rev. 993 (1994), and Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 Vand. L. Rev. 1021 (1994). The papers were originally delivered at the program of the Federal Courts Section of the American Association of Law Schools in January, 1994.

The restless mood of Federal Courts scholars is reflected in Professor Althouse's paper, where she comments that at her school (Wisconsin) "nobody else has given a hoot about teaching Federal Courts for nearly ten years," and that as a Federal Courts scholar "you feel more and more marginalized." Althouse, 47 Vand. L. Rev. at 997.

2. Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* (Foundation Press, 1953). The book is now in its third edition. Paul M. Bator, et al., *Hart and Wechsler's The Federal Courts and the Federal System* (Foundation Press, 3rd ed. 1988).

3. Id. at 965.

values as "reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers"[4] and the obligation that judges "be principled in their reasoning."[5] He suggests that although the rise of interdisciplinary studies has overshadowed the process-based methodology that characterizes most Federal Courts teaching and scholarship, the traditional approach to Federal Courts still has much to offer. In any event, Fallon suggests, there is no good alternative available for the study of the allocation issues that make up the Federal Courts field.[6]

In this article I argue that the "Hart & Wechsler paradigm" (as Fallon calls their model)[7] no longer serves us well either as an account of what the Supreme Court does in Federal Courts cases or as a guide to what the Court ought to do. In its place, I propose a new, more fruitful model for analyzing the normative issues that arise in Federal Courts cases. I call it the "pragmatic paradigm," because its central feature is the pragmatist precept that no value should be taken as foundational, be it process, federalism, or separation of powers. Rather, the force of any of these values in a given case depends on the arguments that can be mustered in their support, and those arguments will vary in strength depending on context.

I. THE HART & WECHSLER PARADIGM

Hart & Wechsler's casebook contains no explicit model of Federal Courts Law. Even so, Fallon is right to discern a paradigm in the materials, in contemporaneous writings by the book's authors, and in the scholarly tradition they spawned. Fallon notes that "the central, organizing question of Federal Courts doctrine involves allocations of authority: *Who* ought to have authority to give conclusive determinations of *which* kinds of questions?"[8] The insight linking allocation issues is that "authority to decide must at least sometimes include authority to decide wrongly . . . Once [this] point is recognized, it becomes evident that constitutional federalism and the separation of powers can

4. Id. at 966.
5. Id. at 966.
6. *Reflections* at 971-72 (cited in note 1).
7. Fallon borrows the term "paradigm" from Thomas S. Kuhn, *The Structure of Scientific Revolutions* (U. of Chi. Press, 2d ed. 1970), where it is used to signify "a set of assumptions that defines both a series of problems worth solving and a framework within which answers to those problems can be sought." *Reflections* at 955 (cited in note 1) citing T. Kuhn, supra, at 23-51.
8. *Reflections* at 962 (cited in note 1).

be illuminated by painstaking attention to the question of *where* ultimate responsibility for certain kinds of questions, including the power to make uncorrectable mistakes, should lie."[9]

In addressing allocation issues, Hart & Wechsler employed six methodological assumptions. These include:

(1) "The principle of institutional settlement," which holds "that decisions which are the duly arrived at result of duly established procedures for making decisions of this kind ought to be accepted as binding on the whole society unless and until they are duly changed."[10]

(2) "The anti-positivist principle," that allocation decisions must be understood "as a rich, fluid, and evolving set of norms for effective governance and dispute resolution, not as a positivist system of fixed and determinate rules."[11]

(3) "The principle of structural interpretation," which provides that "[i]n disputes about the proper allocation of decision-making authority, the principles and policies underlying federalism and the separation of powers deserve special weight."[12]

(4) "The principle of the rule of law," which implies that "the courts have irreducible functions" and "requires the availability of judicial remedies sufficient to vindicate fundamental legal principles."[13]

(5) "The principle of reasoned elaboration," that judicial creativity is constrained by "the reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers."[14]

(6) "The neutrality principle," which forbids courts to "mak[e] law or policy out of whole cloth, [or] . . . to impose substantive judicial judgments on disputes not capable of resoluton through the application of neutral principles to sharply defined sets of facts."[15]

I include among the scholars who generally subscribe to this model—the "Legal Process" model—not only Henry Hart, Herbert Wechsler, and Richard Fallon, but also other leading figures in Federal Courts scholarship over the past forty years, among

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9. Id.

10. Id. at 964 & n.48, quoting Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 4 (William N. Eskridge, Jr. & Philip P. Frickey pub. eds.) (Foundation Press, 1994).

11. *Reflections* at 965 (cited in note 1).

12. Id.

13. Id. at 965-66.

14. Id. at 966.

15. Id.

them Akhil Amar, Paul Bator, George Brown, Erwin Chemerinsky, Daniel Meltzer, Henry Monaghan, Paul Mishkin, Gene Nichol, Martin Redish, David Shapiro, and Larry Yackle, as well as a host of younger scholars, such as Ann Althouse and Barry Friedman, who follow their lead. These Legal Process scholars do not always march in lockstep. For example, the "anti-positivist principle" counts for more with some than others.[16] They also differ, sometimes sharply, on their views of what the law is and should be.[17] All the same, these scholars share enough in common to justify placing them all under Fallon's Legal Process umbrella.

II. PROCESS VALUES IN FEDERAL COURTS LAW

Four premises of the Hart & Wechsler paradigm, the "anti-positivist principle," the "principle of the rule of law," the "principle of reasoned elaboration," and the "neutrality principle," reflect the emphasis Legal Process scholars place upon identifying the distinctive features of *judicial* decision making.[18] Elaborating on Fallon's sketch, they formulate the constraints under which judges operate in a variety of ways—sometimes as a duty to treat like cases alike,[19] to make a coherent body of law that achieves "integrity,"[20] to decide cases according to principle,[21] or to avoid "checkerboard solutions" that make arbitrary distinctions between cases that are similar in relevant respects.[22] Again, Legal Process scholars who advance arguments of this sort hardly concur on all particulars. For my purposes, though, their areas of agreement are far more important than their disagreements. I shall treat them as a group, generally using the term "coherence" to represent their uniting features.

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16. Compare Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71 (1984) with David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543 (1985).

17. Compare Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030 (1982) with Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985).

18. For the historical roots of this effort, see G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 Va. L. Rev. 279, 280-91 (1973).

19. See, e.g., M.P. Golding, *Principled Decision-Making and the Supreme Court*, 63 Colum. L. Rev. 35, 38-40 (1963).

20. See Ronald Dworkin, *Law's Empire* at 165-67 (Harv. U. Press, 1986); Philip Soper, *Dworkin's Domain*, 100 Harv. L. Rev. 1166, 1172-74 (1987).

21. See, e.g., Herbert Wechsler, *Principles, Policies, and Fundamental Law* 3-48 (Harv. U. Press, 1961); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 Colum. L. Rev. 982 (1978).

22. See Dworkin, *Law's Empire* at 178-84 (cited in note 20).

I base my claim that federal courts law is largely incoherent on the proliferation of diametrically opposed principles in jurisdictional doctrine. Some of these conflicts relate to separation of powers issues, and in particular to the role of the federal courts in our tripartite system of government. In broad terms, the issues here concern whether and when the federal courts should defer to the other branches. Other contradictory premises bear on the relationship between the federal courts and the state courts. Are the state courts the principal judicial bodies in our system, reflecting the Madisonian compromise of Article III, or are dominant judicial roles to be assigned to the federal courts? On both separation of powers and federalism issues, the Supreme Court's pattern of decisions reflects considerable incoherence.

A. Separation of Powers

The issue here is the role of the federal courts in the tripartite scheme of American government. Is it better to think of federal courts as ordinary judicial tribunals whose task is to resolve traditional disputes, differing from state courts only in that Congress may limit their jurisdiction? Or is the federal judiciary more appropriately considered an institution that defines and elaborates the meaning of constitutional and other public values, serving as a bulwark against overreaching by the legislative and executive branches?[23] The Supreme Court has never settled on either of these alternatives or even on some synthesis of them. Instead, it has shifted back and forth between the poles, producing incoherent bodies of doctrine on a diverse range of issues. In the law of standing, for example, some decisions begin from the premise that the federal courts are traditional fora for dispute resolution,[24] while other cases view the judiciary as the organ of government charged with the defense and explication of constitutional values, and are little troubled by the niceties of common

23. Cf. Abram Chayes, *The Supreme Court, 1991 Term — Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 1, 4-5 (1982) (distinguishing two models of litigation, the "classical model" and the "contemporary" model, that roughly correspond to the two conceptions of the federal judiciary discussed in the text).

24. This, of course, is the regime of *Frothingham v. Mellon*, 262 U.S. 447 (1923) (taxpayer lacks sufficiently strong interest to challenge federal statute providing subsidies to mothers and infants); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (taxpayers lack sufficiently concete injury to challenge executive branch transfer of property under the first amendment's establishment clause); and *Lujan v. Defenders of Wildlife*, — U.S. —, 112 S. Ct. 2130 (1992) (environmentalists lack standing to challenge practices that result in general environmental injury that does not affect them in some particular way).

law litigation.[25] Causation, redressability, third party standing and mootness decisions reflect similar tensions.[26]

Other separation of powers doctrines are equally incoherent. The Court has never squarely addressed the scope of Congressional power to restrict federal jurisdiction.[27] The Court's "opinions devoted to the . . . validity of legislative and administrative tribunals [which lack Article III independence] are as troubled, arcane, confused and confusing as could be imagined."[28] Its decisions on the appropriate scope of the federal common law of remedies began with *Bivens v. Six Unknown Named Federal Agents*,[29] which takes a liberal view of judicial power and seems to rest on the premise that the federal judiciary serves as a bulwark against overreaching by the other branches.[30] More recently, in a line of cases that culminated with *Schweiker v. Chilicky*,[31] the Court denies a damages action, even where other available remedies are not adequate to vindicate the asserted constitutional rights. The unstated premise of the holding in *Chilicky* is that the federal courts have no special role in defending constitutional rights against the other branches. It is too hasty to conclude that *Chilicky* overrules *Bivens*, for the Court has not drawn the earlier case into question. But once again,

25. See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968) (taxpayers have standing to challenge on establishemnt clause grounds federal statute authorizing ai for religious schools); *Baker v. Carr*, 369 U.S. 186 (1962) (voters may bring constitutional challenge against malapportioned districts); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (environmentalists may challenge statute limiting liability for nuclear accidents before any accident has occurred).

26. See, e.g., Chayes, 96 Harv. L. Rev. at 17-19 (cited in note 23); Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 Va. L. Rev. 1117 (1989); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 Cornell L. Rev. 663, 680-88 (1977). See also *New York v. Ferber*, 458 U.S. 747 (1982), *McGowan v. Maryland*, 366 U.S. 420 (1961); *Craig v. Boren*, 429 U.S. 190 (1976); *Gooding v. Wilson*, 405 U.S. 518 (1972).

27. See, e.g., *Webster v. Doe*, 486 U.S. 592 (1988) (ducking the "serious constitutional question" of Congressional power to limit lower court jurisdiction over constitutional claims); see also Hart and Wechsler, *The Federal Courts* at 410 & n.27 (cited in note 2) (collecting cases). With regard to the Supreme Court's jurisdiction, the language of *Ex parte McCardle*, 68 U.S. (7 Wall.) 506 (1868), suggests that Congress's power is plenary, but an opaque footnote seems to take back what the text has conceded. See William W. Van Alstyne, *A Critical Guide to* Ex parte McCardle, 15 Ariz. L. Rev. 229, 248 (1973).

28. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 239 (1990).

29. 403 U.S. 388 (1971). Much earlier the Court had, in effect, recognized an implied federal cause of action for injunctive relief for constitutional violations. See Peter W. Low and John C. Jeffries, Jr., *Federal Courts and The Law of Federal-State Relations* 424 (Foundation Press, 3d ed. 1994) (discussing *Ex parte Young*, 209 U.S. 123 (1908).)

30. Early cases following *Bivens*, including *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980), reflect the same undergirding.

31. 487 U.S. 412 (1988). See also *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983); *United States v. Stanley*, 483 U.S. 669 (1987).

two opposing lines of decisions have been allowed to co-exist, resting on inconsistent and unarticulated premises.[32]

B. FEDERALISM

Apart from separation of powers issues, the major source of intellectual controversy in Federal Courts law is the allocation of jurisdiction between federal and state courts to hear federal issues, especially constitutional challenges to state action. This is the central problem the Court faces in determining the proper scope of the federal question jurisdiction, the section 1983 cause of action, and federal habeas corpus for state prisoners. In resolving these issues, the Court might have begun from either of two general premises regarding the roles of federal and state courts in the federal system. It could characterize the state courts as the primary adjudicators of constitutional issues, with access to federal courts permitted only in exigent circumstances.[33] Alternatively, it could presume that federal courts should generally be available at the behest of litigants with federal claims, unless there are compelling reasons to deny a federal forum.[34] Or it might devise some more complex principle that avoids a stark rejection of either state or federal interests. Instead, it again moves between the two poles, shifting from a strong presumption in favor of state courts to a policy of primary access to federal jurisdiction, and back again. The best source of illustrations is Fallon's article, *The Ideologies of Federal Courts Law*,[35] where he surveys a range of issues bearing on the allocation of authority between federal and state courts and concludes that "federal courts law is contradictory and unstable at its foundations, because it credits the antinomic premises of the Federalist and Nationalist models and oscillates between them."[36]

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32. See Nichol, 75 Va. L. Rev. at 1153-54 (cited in note 26). For more illustrations of this dichotomy between two views of the scope of Congressional power, see Richard H. Fallon and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1779-87 (1991); Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. Cal. L. Rev. 735, 741-67 (1992).

33. For an illustration of this approach, see Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 Wm. & Mary L. Rev. 605 (1981).

34. This approach is illustrated by Barry Friedman, *A Revisionist Theory of Abstention*, 88 Mich. L. Rev. 530 (1989) and Martin H. Redish, *Reassessing the Allocation of Judicial Business Betwen State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles"*, 78 Va. L. Rev. 1769 (1992).

35. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141, 1164-1223 (1988).

36. Id. at 1223. See also Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. Rev. 59, 69-75 (1981); Friedman, 88 Mich. L. Rev. at 536-46 (cited in note 34).

III. JURISDICTIONAL POLICY VS. SUBSTANTIVE GOALS

Besides the coherence constraint, which applies across the whole range of legal issues, Hart & Wechsler's "principle of structural interpretation" provides that "[i]n disputes about the proper allocation of decisionmaking authority, the principles and policies underlying federalism and the separation of powers deserve special weight."[37] Fallon does not specify the content of these "principles and policies underlying federalism and separation of powers." It will be necessary for present purposes to identify a few of them, for I wish to examine their actual role in adjudication. In the Hart & Wechsler paradigm, issues of standing, mootness, and ripeness turn on such considerations as the adverseness of the parties, how pressing is the need to decide an issue, whether the facts are sufficiently developed to permit effective adjudication, and whether judicial intervention would intrude on the prerogatives of the other branches. Decisionmaking is allocated between federal and state courts on the basis of such factors as the respective competence of the two systems, with state courts preferred for state law and federal courts for federal law. Other considerations bearing on the allocation issue include sensitivity to the state interest in a role for state courts in deciding constitutional challenges to state law and in construing state law so as to save it from nullification, due regard for state procedures, and respect for the value of finality in litigation. Such general policies as promoting uniformity in federal law, efficiency in litigation, and avoidance of unnecessary constitutional decisions, also contribute to jurisdictional doctrine.

These aims, though sometimes at odds with one another, may be grouped together for the sake of analysis under the rubric "jurisdictional policy." In order to test their importance in the resolution of cases, jurisdictional policy considerations may be contrasted with a very different ground of decision: the desire to further some substantive interest. The Court may employ jurisdictional law either to advance or hinder the states' substantive interests in regulation as against the contrary individual interest in constitutional constraints on state regulation. In a series of earlier articles I develop the theme that substantive interests heavily influence jurisdictional decisions.[38] To summarize, the first step is to recognize that jurisdictional decisions on such

37. *Reflections* at 965 (cited in note 1).

38. See Michael Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 Wm. & Mary L. Rev. 499 (1989); Michael Wells, *Rhetoric and Reality in the*

matters as standing, federal review of state judgments, and the allocation of cases between federal and state courts often have *consequences* for substantive rights and obligations, not merely in the dispute at hand but across a range of cases with similar features.[39] Though the Court rarely acknowledges the influence of substance upon its decisions, preferring to speak of jurisdictional policy, its actions often belie its words. A given jurisdictional policy seems to carry great weight in one context, only to be ignored in another where it seems equally applicable. A more plausible explanation for many jurisdictional rulings is that the Court seeks indirectly to advance substantive interests by allocating disputes to one or another tribunal or keeping them out of court altogether.[40]

When the Court bases jurisdictional decisions on substantive considerations, federalism and separation of powers concerns ("jurisdictional policy" in my usage) simply cannot receive the priority Hart & Wechsler accord them. That is why substantive themes in jurisdictional decisionmaking threaten the integrity of the Hart & Wechsler paradigm. Since jurisdictional policy is the glue that holds together the cases Hart & Wechsler call Federal Courts law, showing that substantive interests have significant impact on allocational decisions undermines the descriptive utility of their model. Unless jurisdictional policy concerns dominate adjudication in the area, their structure is of secondary importance, a partial model useful only in those cases where substance does *not* have much influence.

Fallon recognizes the threat and tries to save the paradigm by co-opting the substantive theme. He concedes that substance plays a role in jurisdictional law, but maintains that this is compatible with the Legal Process tradition.[41] For example, Hart & Wechsler proposed that "protective jurisdiction"—federal juris-

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Law of Federal Courts, 6 Const. Comm. 367 (1989); Michael Wells, *Is Disparity a Problem?*, 22 Ga. L. Rev. 283 (1988).

39. See Wells, 30 Wm. & Mary L. Rev. at 505-10 (cited in note 38).

40. See id. at 519-40. In a conversation about this article, Fallon suggested that the distinction between jurisdictional policy and substantive goals is illusory, since the ultimate aim behind policies like finality, comity, uniformity, and the rest is a regime of jurisdictional law that achieves the best body of substantive law. So it is. Yet the distinction remains illuminating, for in the Hart & Wechsler paradigm these policies are the grounds for a body of jurisdictional law that facilitates the implementation of *whatever* substantive goals happen to be generated *elsewhere* in the legal system. By contrast, my thesis (elaborated in the articles cited in note 38) is that the Court often abandons jurisdictional policy as its grounds for jurisdictional rules. Instead it begins with the specific substantive aims of favoring or thwarting state regulatory interests and chooses jurisdictional rules that will advance its substantive agenda.

41. *Reflections* at 973 & nn.85-86 (cited in note 1).

diction over state law questions—would be appropriate if some federal interest were at stake in a case and state courts could not be trusted to give it sufficient weight.[42] Similarly, Paul Bator generally disapproved of federal habeas corpus for state prisoners, but would have allowed habeas review where the petitioner had not received a full and fair hearing of his federal claims in state court.[43]

As these examples show, however, substantive interests typically serve only a subsidiary and derivative function in the Hart & Wechsler paradigm. Substance matters only because of the Hart & Wechsler premise that, as a matter of jurisdictional policy, allocation decisions should turn, in part, on the competence of the tribunal.[44] If federal interests or federal rights cannot receive a fair hearing in a state court, then the state court is not competent to adjudicate them.[45] This standard will only be met in the rare case where there is a wide gap between the state and federal courts.[46] While the substantive impact of jurisdictional doctrine acts as a marginal limiting principle in Hart & Wechsler, substantive interests in fact influence a far broader range of cases than Legal Process scholars would allow. The Hart & Wechsler paradigm cannot account for the ubiquitous role substance actually plays in Federal Courts law.

Can the menace posed by substantive themes to Hart & Wechsler be deflected by modifying the model? Not likely. The only "modification" that would work is to acknowledge a bigger role for substance than institutional competence arguments would allow.[47] In that event, the effort to save the paradigm

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42. See Hart and Wechsler, *The Federal Courts* at 745-46 (cited in note 2).

43. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963).

44. See Hart and Wechsler, *The Federal Courts* at xi-xii (cited in note 2); Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 Cardozo L. Rev. 601, 657-61 (1993).

45. See Bator, et al., *Hart and Wechsler's The Federal Courts* at 1654-55 (cited in note 2).

46. Cf. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. Cal. L. Rev. 2507, 2511 n. 20 (1993) (asserting that the mere presence of substantive impact is not enough to overcome jurisdictional policy considerations).

47. Some of Fallon's examples suggest that the Hart & Wechsler paradigm recognizes a role for substance beyond considerations of institutional competence. In particular, Fallon mentions Hart & Wechsler's "generally hospitable stance toward administrative adjudication" and Hart's support for federal habeas corpus, both of which may be grounded in substantive considerations. Neither Hart nor Fallon argue that these allocation choices depend on an argument that courts are not competent to hear matters confided to agencies or that habeas is generally appropriate because state courts cannot be trusted to apply the constitution correctly. *Reflections* at 973-74 & n.86 (cited in note 1).

would end up destroying it. Jurisdictional policy would have no special role in Federal Courts law, but would always have to compete with substantive interests for the Court's favor. To the extent substantive considerations override jurisdictional policy—and the Supreme Court's performance indicates that they often do so—Hart & Wechsler's aim of making a body of allocational law that implements the values of federalism and separation of powers is severely compromised, if not lost altogether.

IV. TOWARD A PRAGMATIC PARADIGM OF FEDERAL COURTS LAW

What is accomplished by showing that the Hart & Wechsler paradigm fails to explain many significant developments in Federal Courts Law over the past thirty years? After all, any model abstracts from reality in an effort to locate the common threads running through the bulk of the cases. There will virtually always be some aberrant cases that do not fit. Notwithstanding all the anomalies, Hart & Wechsler still helps us to make sense of much Federal Courts doctrine. Armed with the casebook, or one of the books it has inspired, a lawyer is well-equipped to grapple with most routine jurisdictional issues.[48] Hart & Wechsler will, and should, remain the reigning paradigm until someone comes up with a model that is more useful in explaining and predicting outcomes of hard cases, and in identifying the normative issues raised by such cases.[49]

This section of the article proposes an alternative to Hart & Wechsler. The new model builds upon the critique developed in earlier articles and summarized in the preceding sections. Legal Process scholars take it for granted that courts do and should adhere to process values, the concerns that I have lumped together under the heading "coherence." In the particular context

48. Cf. Richard A. Matasar, *Treatise Writing and Federal Jurisdiction Scholarship: Does Doctrine Matter When Law Is Politics?*, 89 Mich. L. Rev. 1499, 1515 (1991) (reviewing Erwin Chemerinsky, *Federal Jurisdiction* (Little Brown & Co. (1989)) (pointing out that Chemerinsky's *Federal Jurisdiction* treatise is valuable in spite of the instability of Federal Courts law, because "lower courts act as if they are constrained by doctrine," because "some questions, even in federal jurisdiction cases, have easy, non-controversial answers," and because "treatises help students.")

49. This insight is "a central point" of Thomas Kuhn's intellectual history of science. Kuhn, *Scientific Revolutions* at 77 (cited in note 7) ("[T]he act of judgment that leads scientists to reject a previously accepted theory is always based upon more than a comparison of that theory with the world. The decision to reject one paradigm is always simultaneously the decision to accept another, and the judgment leading to that decision involves the comparison of both paradigms with nature *and* with each other.") (emphasis in original) Whatever the differences between the role of paradigms in law and in science, this proposition seems applicable to law as well.

of Federal Courts, they begin their analysis of any issue from the assumption that principles of federalism and separation of powers, which I have labeled "jurisdictional policy," do and should control the outcome. While the counterexamples to Hart & Wechsler are not by themselves fatal, they do raise questions that Legal Process scholars never address. Significant departures from the model cast doubt on the viability of Hart & Wechsler's assumptions. They raise the possibility that the unconforming cases are not aberrations at all, but rather indications that the model overlooks some important themes that lawyers and scholars who seek to understand and improve Federal Courts law need to examine.

I call the new paradigm a "pragmatic" model of Federal Courts law in order to underline a central difference between its premises and those of Hart & Wechsler. Hart & Wechsler takes the predominance of jurisdictional policy and process values as foundational assumptions that are themselves beyond question. By contrast, a characteristic of pragmatism in philosophy and law is its refusal to take any proposition as foundational.[50] Instead, pragmatists hold that the strength of a value may vary according to context. Notably, they believe in "balancing rule-of-law virtues against equitable and discretionary case-specific considerations."[51] The linchpin of the new model is that, from a pragmatic perspective, jurisdictional policy and process values may be strong enough to control some allocation disputes but not others.

A. Describing Federal Courts Law

Like Hart & Wechsler, the pragmatic model has both descriptive and normative dimensions. Its descriptive claims should be evident by now: Coherence and jurisdictional policy in fact count for far less in Federal Courts law than the Hart & Wechsler model suggests, especially in the hard cases that most severely test the Supreme Court's fidelity to the theory. Arbitrary distinctions and doctrinal confusion are persistent features of modern Federal Courts law. Many doctrinal developments cannot be understood without taking account of the substantive interests furthered by the jurisdictional holding.

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50. See, e.g., Richard A. Posner, *The Problems of Jurisprudence* 26-28, 462 (Harv. U. Press, 1990); Edwin W. Patterson, *Men and Ideas of the Law* at 471-73 (Foundation Press, 1953); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 Minn. L. Rev. 1331, 1334-49 (1988).

51. Posner, *The Problems of Jurisprudence* at 26 (cited in note 50).

I submit that the new paradigm is descriptively more powerful, and therefore more useful to scholars and students seeking to understand what the Court does and why, than Hart & Wechsler. Students schooled in the new paradigm would have foreseen, in 1960, that the Warren Court would tear down barriers to federal court and, a decade later, that the conservative majority of the 1970s and 1980s would put those barriers up again. They would understand the chronic instability of the law of legislative courts, habeas corpus, and Supreme Court review of state judgments. They would recognize that these shifts in direction on the Court's part almost inevitably produce arbitrary distinctions in the case law. By treating these and other examples of incoherent doctrine and substantive themes as though they were merely aberrations, the Hart & Wechsler paradigm fails to respect their ubiquity in Federal Courts doctrine.

Some parts of Federal Courts doctrine remain coherent and some are based on jurisdictional policy rather than substance. The pragmatic paradigm provides a means for determining which areas are likely to fall into this category. Substance will play a significant role only where the ruling on the jurisdictional issue can have substantive impact across a range of cases featuring similar characteristics. So long as there is disparity between federal and state courts, state governments and their officers will tend to prefer state court and persons challenging state action on federal grounds will want to litigate in federal court. But substantive themes will generally not intrude on issues like appealability, or most of the law of ripeness and mootness, or the role of federal procedural law in diversity cases, where the substantive interests furthered by a given jurisdictional ruling will vary from case to case. Substantive themes will be comparatively less important in periods of our history when there is little disparity between federal and state courts, such as the period between the New Deal and the Warren Court.[52]

Incoherence and confusion proliferate where there is serious disagreement over the proper rule, either because of the substantive consequences of the rule or because of divergent views of jurisdictional policy. For example, the legal regime regarding legislative courts will remain instable and incoherent for as long as the justices cannot agree about the comparative importance of the abstract value of adjudication by an independent judiciary versus the practical concerns that motivate Congress to channel an array of issues to lesser tribunals. By contrast, at least since

52. Wells, 22 Ga. L. Rev. at 311 (cited in note 38).

the Civil War no one has seriously questioned the validity of Supreme Court review of state judgments turning on federal issues or the general principle of federal supremacy. That is why *Martin v. Hunter's Lessee*[53] remains in the casebooks, while *American Insurance Co. v. Canter*[54] (an early "legislative courts" case) is relegated to a note, if it is mentioned at all.

Unlike the conflict between substance and jurisdictional policy, this tension between fidelity to process values and a court's proclivity to seize the opportunity to enforce its own values is hardly limited to Federal Courts context. It runs throughout the law, and process values may lose out to other considerations in any doctrinal context. An ambitious version of the new paradigm would claim that process values are *especially weak* in the modern Federal Courts context. Proving this assertion would require a detailed comparison of incoherence across doctrinal contexts, a task that cannot be undertaken here. For purposes of sketching the new paradigm, it seems sufficient to point out that over the past thirty years few areas of the law have undergone the kind of wrenching changes, first in one direction and then in another, witnessed by Federal Courts law in that period. Whether or not this history shows that process values are weaker in Federal Courts law than elsewhere, it does rebut the Legal Process assumption that process values are strong in the Federal Courts context.

B. Normative Issues

Demonstrating the descriptive inadequacy of the Hart & Wechsler paradigm is not enough to bring it down. As Fallon points out, "[e]ven if some other model did have greater descriptive power, this . . . would not be fatal to the normative claims of the Legal Process school."[55] But it is here, in regard to the normative foundations of allocation doctrine, that a new paradigm is most needed in our effort to appreciate the nature of Federal Courts law and learn how to make it better. The problem with the Hart & Wechsler paradigm is not that its normative claims are patently unconvincing. Rather, the fault is that Hart & Wechsler takes for granted normative premises that are contestable, and hence require analysis and justification. The pragmatic paradigm provides a framework for undertaking that analysis

53. 14 U.S. (1 Wheat.) 304 (1816).
54. 26 U.S. (1 Pet.) 511 (1828).
55. *Reflections* at 975 n.93 (cited in note 1).

and for evaluating the normative claims of the Legal Process in Federal Courts law.

1. The Normative Force of Jurisdictional Policy

Fallon's third methodological assumption is that "[i]n disputes about the proper allocation of decisionmaking authority, the principles and policies underlying federalism and the separation of powers deserve special weight."[56] Accordingly, one normative component of the Hart & Wechsler paradigm is a claim that federalism and separation of powers concerns like competence, comity, uniformity, finality, and fitness should generally override substantive considerations in the resolution of jurisdictional issues. Unlike Hart & Wechsler, the pragmatic paradigm does not take this Legal Process precept as an assumption; it requires that the normative claim be defended. The normative issue identified by the new paradigm regarding the role of jurisdictional policy in resolving Federal Courts issues is whether partisans of the Legal Process can justify the preeminent role they assign jurisdictional policy. My aim here is not to settle this issue, but only to identify some arguments that may bear upon it.

One step in addressing the normative issue is to examine the reasons behind the high ranking accorded jurisdictional policy by Legal Process scholars. Why should jurisdictional policy receive so much respect? The reason for giving special weight to considerations of federalism and separation of powers cannot be found *within* the Hart & Wechsler paradigm. The problem here is not whether finality should rank higher than uniformity, or whether federal-state comity should be sacrificed for reasons of institutional competence. It is the validity of Hart & Wechsler's premise that the whole complex of jurisdictional policy issues should receive special weight as against substantive considerations.

In order to understand this premise, we must look instead to the broader context of Legal Process theory. The Legal Process movement was a response to the perceived nihilism of the Realists, who had sometimes portrayed adjudication as a matter of choosing between conflicting interests rather than as a quest to identify and implement the common good.[57] In the *Legal Process*, Henry Hart and Albert Sacks conceded that judges make choices among conflicting interests, and set about showing how

56. Id. at 965.

57. See G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America*, 58 Va. L. Rev. 999, 1017-26 (1972).

their discretion is nevertheless constrained by the obligation to engage in reasoned elaboration of legal materials.[58] In addition, there is a sphere in which consensus is attainable, for we should be able to agree on the allocation of decisionmaking among institutions.[59]

Hart and Sacks declared that these "institutionalized procedures and the constitutive arrangements establishing and governing them are obviously more fundamental than the substantive arrangements in the structure of society . . . since they are at once the source of the substantive arrangements and the indispensable means of making them work effectively."[60] The purpose of a legal system is to "maximiz[e] the total satisfactions of valid human wants."[61] A federal system, with its "varied facilities, providing alternative means of working out . . . solutions of problems which cannot be solved unilaterally,"[62] is the best way to "maximize[ ] the opportunities for coping effectively with the problems of social living."[63] Federal Courts law, with its emphasis on such values as competence, comity, finality, uniformity, and the like, is our mechanism for assigning decisions to the appropriate institutions. Given this aim, jurisdictional policy must control allocation decisions.

While a focus on federalism and separation of powers may help achieve Hart's aim of "releas[ing] to the utmost the enormous potential of the human abilities in the society,"[64] the benefits come at a price. The opportunity to pursue the Justices' substantive agenda will be lost. Had the Warren Court taken seriously the values of finality and respect for state procedures, *Fay v. Noia*[65] would not have abandoned the old regime of strict procedural default. If co-ordinating federal and state litigation so as to avoid disruption had mattered much to the Burger Court, it would not have held in *Hicks v. Miranda*[66] that a federal section 1983 case must be dismissed if a state prosecution is filed after the federal case has already begun. Putting aside the issue of which substantive agenda is better, the problem for Legal Pro-

58. See Hart and Sacks, *The Legal Process* at 92-93, 141-43, 144-50, 155 (cited in note 10).

59. Id. at 3-4; *Reflections* at 964 (cited in note 1).

60. Id. at 3-4.

61. Id. at 105. See also Duxbury, 15 Cardozo L. Rev. at 656-57 (cited in note 44).

62. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 490 (1954).

63. Id. at 542. See also *Reflections* at 965 (cited in note 1).

64. Hart, 54 Colum. L. Rev. at 490 (cited in note 62).

65. 372 U.S. 391 (1963).

66. 422 U.S. 332 (1975). See Wells, 60 N.C. L. Rev. at 71 (cited in note 36).

cess theorists is to explain why the Court should forego its substantive agenda in order to pursue the benefits that may flow from the wise application of jurisdictional policy.

How can the case for substance be rebutted? We may usefully distinguish between two kinds of arguments one might advance for the priority of jurisdictional policy. First, one might try to show that an allocation decision is presumptively illegitimate if it turns on substantive considerations, so that little or nothing of value is lost when judges are forbidden to take substance into account. Even a pragmatist could be convinced that some kinds of judicial behavior, accepting a bribe, for example, are virtually always wrong. It is doubtful whether such an argument could be made with regard to substantive interests and jurisdictional rulings. For one thing, the Hart & Wechsler paradigm itself sometimes employs substantive factors. Although the role of substance is generally limited to the jurisdictional policy of assuring a competent tribunal, neither Henry Hart nor Richard Fallon seems inclined to forbid recourse to substantive themes beyond the competence policy.[67] Note, too, the relevance of the many situations in which substance actually counts. While we cannot derive an ought from an is, the Court's frequent resort to substance should at least give us pause before condemning the practice root and branch. None of this is to deny the possibility of a Legal Process argument against substance. A Legal Process purist might show that even Henry Hart strayed from the true path. The point of my argument is that devotees of Hart & Wechsler must undertake to defend the rejection of substance rather than treat it as holy writ.

Second, Process theorists may abandon the effort to find a general and powerful argument against substance, and instead apply a balancing test. Following this course, they would acknowledge that the priority of jurisdictional policy reflects a choice of values on their part, a preference for federalism and separation of powers over substantive themes, rather than a necessary feature of sound adjudication. In this kind of argument subtance is no longer illegitimate, but only a weaker value than jurisdictional policy. Hence, this argument admits that the implementation of principles of federalism and separation of powers comes at a price. The priority they receive necessarily means that the Court must forego the opportunity to pursue its (legitimate) substantive agenda by jurisdictional means.

67. See discussion in note 47.

Adopting the second argumentative strategy has another consequence that deserves attention. If balancing is the appropriate inquiry, then the strength of the arguments on either side may vary from one issue to another, so that substantive considerations may properly dominate some decisions but not others. A couple of examples will help to make the point.

In the midst of the Warren Court's program of opening the federal courts to more constitutional claims, it was asked to allow removal of a state prosecution to federal district court whenever the defendant raises certain constitutional claims. The Court rejected the invitation,[68] despite its own evident sympathy with the substantive goal behind it, and did so for reasons of jurisdictional policy that nearly everyone would find persuasive. The burden on federal courts and disruption of state processes that such a scheme would entail are sufficient to discredit it.[69] Keep in mind, too, that broad federal habeas was available in that era to protect the substantive interests of persons unconstitutionally convicted in state court.

Valley Forge Christian College v. Americans United for Separation of Church and State[70] presents the balance between substance and jurisdictional policy in a wholly different light. The government had essentially given away property to a religious organization, and citizens and taxpayers opposed to government support for religion sued to rescind the deal, asserting that it violated the Establishment Clause. The Court denied standing, citing other cases holding that taxpayers and citizens generally lack sufficient injury to guarantee effective adjudication, a jurisdictional policy.[71] Plaintiffs sought to avoid the earlier cases on the ground that they concerned efforts to enforce constitutional provisions requiring open budgets and separation between legislative and executive functions, while their case presented claimed violation of their constitutional rights. The Court spurned the proferred distinction: "[W]e know of no principled basis on which to create a hierarchy of constitutonal values or a complementary 'sliding scale' of standing . . ."[72] Under the pragmatic model, this retort is not available. It would be perfectly acceptable to hold that jurisdictional policy generally precludes citizen

68. *Georgia v. Rachel*, 384 U.S. 780 (1966); *City of Greenwood v. Peacock*, 384 U.S. 808 (1966).

69. See Bator, 22 Wm. & Mary L. Rev. at 611-12 (cited in note 33).

70. 454 U.S. 464 (1982).

71. 454 U.S. at 477, 481-83. See Gene R. Nichol, Jr., *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C. L. Rev. 798, 821-27 (1983).

72. 454 U.S. at 484.

standing, but not where there is a substantive right at stake, as there is in Establishment Clause cases.

In addition, the role of substance may vary from one historical period to another. In times where allocational decisions have only slight and unthematic substantive impact, then jurisdictional policy would have strong normative force. Deciding jurisdictional issues within the Hart & Wechsler paradigm would come at a low cost, for it would not require judges to forego the opportunity to pursue substantive ends instead. The forties and early fifties, when Henry Hart and his colleagues worked on both the Legal Process materials and the Federal Courts casebook, may have been such a time.[73] During and after World War II, Americans were largely united on the superiority of democratic rule and individual liberty over their totalitarian competitors in Germany and Russia. Even leading Realists like Karl Llewellyn and Jerome Frank embraced those values.[74] "Secular, humanistic, patriotic, and centrist, the American intellectual scene in the late 1950s and early 1960s were remarkably free from ideological strife."[75]

The growth of modern public law litigation, beginning in 1954 with *Brown v. Board of Education*, and accelerating in the sixties, put an end to this harmony. Disparity between federal and state courts grew more marked, and with it the substantive impact of allocational decisions became harder to ignore. Judges might have shared the Legal Process faith in process as a means toward a better society and resisted any role for substantive considerations in jurisdictional decisions. But, as noted earlier, they often chose substance over process. First the Warren Court bent Federal Courts law to its agenda of substantive constitutional reform, increasing the authority of federal courts by eliminating old barriers to access. Then its right-wing successor began curbing access to the federal forum.[76]

The normative value of the Hart & Wechsler paradigm is necessarily weaker when opportunities to pursue a substantive agenda are present, as they are when constitutional law is a lively area with many controversial issues. During periods like the

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73. See Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216, 217-18 (1948) (describing the problems of Federal Courts law in Legal Process terms).

74. See White, 59 Va. L. Rev. at 282-86 (cited in note 18).

75. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 Harv. L. Rev. 761, 765 (1987).

76. See Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. Rev. 609, 629-41 (1991).

present, when adherence to jurisdictional policy requires passing up the chance to pursue a substantive goal, the cost of fidelity to the Hart & Wechsler paradigm is higher than it is in more tranquil times marked by consensus. No thoughtful person would deny that jurisdictional policies serve worthy goals. The point is that, even so, the paramount value they receive in the Hart & Wechsler paradigm turns out to be the result of a value choice that could plausibly be made the other way. Putting jurisictional policy first is not an essential requisite of sound adjudication of Federal Courts issues.

2. Is Incoherence a Problem?

Legal Process scholars treat the effort to achieve coherence as a primary feature of the judicial function. For example, Herbert Wechsler claimed that "the main constituent of the judicial process is that it must be genuinely principled."[77] For Alexander Bickel, "intellectual incoherence [was] not excusable."[78] Ronald Dworkin maintains that "integrity [his name for coherence] . . . is the life of law as we know it."[79] Categorial declarations like these admit no exceptons. The notion that coherence may be a weak value, in Federal Courts law or anywhere else, is antithetical to the basic principles of the Legal Process school.

The pragmatic paradigm holds that the case for coherence is more problematic. It is wrong to treat coherence or any other proposition of legal theory as though it were immutable and absolute across every doctrinal context. On account of the distinctive features of Federal Courts law, coherence may be less vital here than it is in many other doctrinal areas. At the same time, pursuing coherence comes at a price, for it interferes with other worthy aims. The dichotomies identified in Part II show that in Federal Courts law the Court has tended to rank other goals higher than coherence and hence has been willing to tolerate a higher degree of inconsistency than is permitted elsewhere. The persistence of incoherence in Federal Courts law does not mean the Court is right to act in this way. Still, it should prompt us to examine the Legal Process assumption favoring coherence. Whether the Court's practice is good or bad, Legal Process theorists must face the normative issue rather than merely assuming,

77. Wechsler, *Principles, Policies and Fundamental Law* at 21 (cited in note 21).

78. Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 47 (Harper & Row, 1970). See also Bickel, *The Least Dangerous Branch* 58-59 (Bobbs-Merrill Co., 1962).

79. Dworkin, *Law's Empire* at 167 (cited in note 20).

as they are prone to do, that coherence is vital.[80] If we are to understand and enrich Federal Courts law, we must address the conflict of values, defend the priority of coherence, and perhaps decide that it can sometimes be sacrificed to other ends.

Theorists like Bickel and Wechsler are wrong if they mean to accord coherence lexical priority over all other goals that courts might seek to attain.[81] Wechsler's insistence on the importance of principled decisionmaking as "the main constituent of the judicial process" and Bickel's stern admonition that incoherence is inexcusable suggest that coherence is an essential element of all adjudication. Unless a court puts coherence first, they argue, decisions are illegitimate. The judicial function is to adjudicate, and unprincipled decisionmaking is not adjudication at all.

This kind of language is perhaps best understood as rhetorical emphasis, for it is typically found in arguments aimed at convincing the reader that coherence is important, and bemoaning the lack of it in Supreme Court decisions. If Wechsler and Bickel are taken to assert that coherence comes before all other goals, then their view is untenable. Courts could not function if they had to guarantee coherence above *all* other goals, for judges cannot be expected to work out all the answers when they decide the

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80. A few years ago Richard Fallon, in a characteristic Legal Process article, examined the law on allocation of decisionmaking between federal and state courts and found it (as I do) "contradictory and unstable at its foundations." 79 Va. L. Rev. at 1223 (cited in note 35). Rather than asking whether this is bad, and why, (as the pragmatic model requires), he assumed that it needed correction, and went on to "offer prescriptions for a better reasoned and more coherent body of law." Id. at 1151. See also Redish, 78 Va. L. Rev. at 1769 (cited in note 34); Friedman, 88 Mich. L. Rev. at 531-34 (cited in note 34).

81. If coherence were defined narrowly, as intelligibility, it may well deserve this priority. Lower courts and everyone else need to be able to determine what the law is. But a group of decisions can all be intelligible and still be incoherent in that they create arbitrary distinctions between like cases. See Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. Rev. 273, 276-77 (1992) (distinguishing "coherence as intelligibility" from the use of the term by philosophers in coherence theories of truth).

For example, *Flast v. Cohen*, 392 U.S. 83 (1968) found taxpayers had standing to challenge, on first amendment establishment clause grounds, government aid to parochial schools. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), denied standing to taxpayers seeking to challenge, on first amendment grounds establishment clause grounds, a government transfer of property to a religious organization. The *Valley Forge* Court distinguished *Flast* on the ground that *Flast* concerned action by Congress while the government action attacked in *Flast* was taken by an executive official. See 454 U.S. at 479.

These cases are each intelligible; each sends a clear signal to lower courts as to how later cases are to be treated. They have created no doctrinal conundrums for lower courts. But the taxpayer standing doctrine they create is incoherent, in that there is no good reason why it should matter whether the challenged acion is committed by Congress or an executive official. See Nichol, 61 N.C. L. Rev. at 813-14 (cited in note 71).

first case on a given topic.[82] Nor can we expect all the members of a multi-member Court to agree on the rationales for their rulings.[83] The common law method calls for decision on narrow grounds, working incrementally and gaining insight, until it is possible "by a true induction to state the principle which has . . . been [only] obscurely felt."[84] Other well-established practices indicate that coherence may sometimes be overridden by other values. The large role of jury decisionmaking leads to arbitrary distinctions, as "the idiosyncracies of jury composition combine to hand similar victims altogether dissimilar results."[85] Criminal sentencing is another prominent example. As Judge Marvin Frankel has observed, "widely unequal sentences are imposed every day in great numbers for crimes and criminals not essentially distinguishable from each other."[86]

These examples of sacrificing coherence in favor of other ends should caution us against conceiving of principled decisionmaking as a foundational element of adjudication. Rather, coherence is an aim that must be considered alongside other goals. Its appropriate weight varies from one context to another, because the values underlying it are more crucial in some arenas than others.[87] In order to evaluate its proper role in Federal Courts law, we must first identify the values it serves and then assess their importance in the federal jurisdictional context.

Because coherence seems so obviously desirable, neither judges nor scholars who champion it devote much attention to explaining why coherence is worth achieving. Bickel and Wechsler can be understood as arguing that coherence is essential in the constitutional context because judges must not impose their own values to override the democratic branches of government.

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82. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 351-52 (1974); Thurman Arnold, *Professor Hart's Theology*, 73 Harv. L. Rev. 1298, 1311-12 (1960).

83. See Frank N. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802 (1982).

84. Paul A. Freund, *On Law and Justice* 76 (Harv. U. Press, 1968) (citing Oliver Wendell Holmes, *Codes and the Arrangement of the Law*, 5 Am. L. Rev. 1 (1870), reprinted in 44 Harv. L. Rev. 725 (1931).

85. Stephen D. Sugerman, *Doing Away with Tort Law*, 73 Calif. L. Rev. 555, 594 (1985).

86. Marvin E. Frankel, *Criminal Sentences: Law Without Order* 8 (Hilland Wang, 1972). Sentencing guidelines represent an effort to diminish these disparities, yet they have encountered strong resistance from judges and scholars who think justice is better served by broad discretion to take many factors into account. See, e.g., Albert A. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901 (1991).

87. See Kenneth I. Winston, *On Treating Like Cases Alike*, 62 Cal. L. Rev. 1, 35-39 (1974).

Adherence to "neutral principles" will assure that they do not.[88] Whatever its merit, this thesis cannot account for the emphasis judges place on coherence in other areas of law.

Ronald Dworkin proposes a rationale for coherence in adjudication that is more fundamental to the legal order than those of Wechsler and Bickel. His reasoning deserves careful attention, because it yields a clue to understanding why coherence may deserve comparatively little weight in Federal Courts law. In Dworkin's view, coherence, or "integrity" as he calls it, is "a distinct political virtue beside justice and fairness."[89] Integrity is an attractive goal for a variety of reasons. It "provides protection against partiality or deceit or other forms of official corruption,"[90] and "contributes to the efficiency of law" by avoiding the need for detailed rules on everything.[91]

There is, however, another and more vital reason to strive for integrity in adjudication. A commitment to coherence in government decisionmaking helps to justify the government's claim to obedience from citizens, by making its decisions more acceptable to the losers than they otherwise would be. This concern for giving the losers in conflicts over rights and obligations a coherent explanation shows respect for all citizens and thereby contributes to the well-being of the society as a whole.[92] In order to make his point, Dworkin compares three imaginary communities, one committed to integrity, one that emphasizes rules, and one in which government makes pragmatic, case-by-case judgments that give no special role to either principle or rule. He considers the claims of each to obedience by its members.

For Dworkin pragmatism is unattractive because the members of a pragmatic community necessarily "have no special concern for justice or fairness toward fellow members of their community."[93] People in a rulebook community need only respect the rules, and hence "are free to act in politics almost as selfishly as people in a community of circumstances can."[94] Neither rule-based decisionmaking nor pragmatic case-by-case judgments will warrant as much respect from those disadvantaged by the outcome of adjudication as will a process that is

88. See Wechsler, *Principles, Policies and Fundamental Law* at 21-23, 27 (cited in note 21).

89. Dworkin, *Law's Empire* at 166 (cited in note 20).

90. Id. at 188.

91. Id. at 188-89.

92. Id. at 191-92.

93. Id. at 212.

94. Id.

committed to coherence.[95] "A community of principle, faithful to that promise, can claim the authority of a genuine associative community and can therefore claim moral legitimacy—that its collective decisions are matters of obligation and not bare power—in the name of fraternity."[96]

Dworkin may be right that judicial decisions determining rights and liabilities deserve substantially more respect, even from the losers, when judges strive for coherence than when they draw arbitrary lines. No one likes to lose, but defeat is easier to accept when based on substantial reasons. Yet the foregoing discussion of coherence shows that it is not an essential element of adjudication. It is a means of implementing values whose strength varies depending on context. The force of Dworkin's argument is strongest when judges are determining substantive rights and duties.[97] The loser who deserves an explanation is one who has something of value taken from him. Whatever our views of abortion, Dworkin says, we would not tolerate a "checkerboard" solution to the abortion controversy that would allow abortions for women born in odd years but not those born in even years,[98] just because "we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are."[99]

In Federal Courts law, by contrast, the stakes are typically different. Let us suppose, for the sake of exposition, that Federal Courts problems are governed solely by considerations of jurisdictional policy. In that event, the contested issues are not rights and obligations, but the distribution of authority among institutions. Whether the issue is federal district court jurisdiction, Supreme Court review, habeas corpus, the scope of federal common law, or abstention, the Court's task is to determine which judicial system will make decisions about rights and duties, not what the content of those substantive obligations will be. Ripeness, mootness, and standing deal with the proper timing of adjudication and the identification of proper parties to raise substantive issues, not with the merits of the claims they present. Problems of congressional control of federal jurisdiction and the

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95. Id. at 208-15.

96. Id. at 214.

97. Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537, 546-48 (1982)(equal treatment is a value only when substantive rights are defined as requiring it).

98. See Dworkin, *Law's Empire* at 178-84 (cited in note 20).

99. Id. at 166.

role of federal courts in creating remedies concern the distribution of power among the branches of the national government.

In all of these matters, what is at stake is the implementation of one or another view of the conditions for effective adjudication, federal-state relations, or separation of powers among the branches of the national government. To the extent Federal Courts law addresses institutional powers and relationships, no one's rights and obligations are impacted by it. No "principles of justice and fairness" are at stake, and so there arises no need to justify the outcome to the loser in order to maintain the authority of a "genuine associative community." I submit that we would not be embarrassed to tell the disappointed litigant in such a jurisdictional dispute that he lost on account of a distinction that is as arbitrary as his birthdate.

The argument advanced in the last two paragraphs is sufficient to rebut the claims of coherence in some parts of Federal Courts law, for there are areas where jurisdictional policy is dominant. It seems unlikely that most of the doctrine on the scope of federal question jurisdiction or the powers of "legislative courts" has any systematic substantive impact on the outcomes of litigation. It seems appropriate to have such matters governed by pragmatic factors rather than insisting that general principles be devised for them.[100]

But the foregoing discussion is hardly sufficient to dispose of coherence altogether, because its premise ignores one of the themes of this article: Contrary to the Hart & Wechsler paradigm, much jurisdictional law in fact has a strong substantive component. Litigants' rights and duties *are* affected by allocational rulings. Ironically, the value of coherence is stronger in connection with those parts of Federal Courts law that are *not* based solely on jurisdictional policy.

Does it follow that someone who generally accepts coherence as an important value must deplore its absence in those parts of Federal Courts law where substantive considerations weigh heavily in adjudication? I do not think so. There is a crucial difference between judicial decisions that resolve substantive disputes and lay down rules for future conduct, on the one hand, and jurisdictional rules that assign decisionmaking power on the other. Despite the substantive implications of jurisdictional rules, that impact is oblique and uncertain. No one knows whether a different jurisdictional rule would have changed the

100. See Shapiro, 60 N.Y.U. L. Rev. at 568-70 (cited in note 16); Bator, 65 Ind. L.J. at 254-60 (cited in note 28).

outcome of any given case. The Supreme Court insists that there is really no significant disparity between federal and state courts anyway.[101] No one can decisively prove that the Court is wrong.[102] Complicating matters further, the degree of disparity varies from time to time as the makeup of the federal courts changes. From 1981 to 1992, for example, the influx of Republican appointments to the federal courts may have narrowed the gap between federal and state courts, weakening the argument that allocation decisions have significant substantive consequences. With the Democrats in power, any disparity may widen.[103]

In these circumstances, it is hard to make a compelling claim of unfairness if a litigant is denied a federal forum due to an arbitrary distinction in the jurisdictional law. The incoherence of federal courts law surely violates Dworkin's principle of integrity. But there are degrees of unfairness, and the unfairness resulting from arbitrary jurisdictional rules is, comparatively speaking, minor. The injustice done by them is too inchoate, the victims too hard to identify, the outcomes too difficult to predict, to demand coherence as a first and absolutely essential principle in jurisdictional law.

Dworkin is right that Americans would recoil at the notion of compromising competing views on abortion by allowing persons born in odd-numbered years to have abortions while denying them to women born in even-numbered years. I do not pretend that such a system for determining federal jurisdiction would be lauded by the public. But my point is a relative one, and the outcry over arbitrary allocation of judicial authority would certainly be pale in comparison to that in the personal liberties context. Our comparative quiescence in the face of chronic incoherence merely illustrates the point.

Also, coherence comes at a price. If coherence is, or is at least perceived by the United States Supreme Court to be, a comparatively unimportant goal in Federal Courts jurisprudence, flexibility is not. Drawing arbitrary or compromised lines has

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101. See, e.g., *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988); *Allen v. McCurry*, 449 U.S. 90, 105 (1980); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975).

102. See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 U.C.L.A. L. Rev. 233 (1988).

103. See Stephen Labaton, *Clinton May Use Diversity Pledge to Remake Courts*, N.Y. Times, A1, col. 6 (March 8, 1993) (national edition) ("With a near-record number of vacancies on the Federal bench and the likelihood that Congress will pass a measure to create dozens more, President Clinton is expected to name hundreds of judges over the next four years and dramatically alter the judicial landscape after 12 years of Republican appointments.").

proven useful to the Court in accommodating federal and state interests that are difficult to reconcile in principled terms. Federal Courts law is racked with conflict. States assert essential interests in finality, sovereignty, procedural integrity and efficiency, the determination and interpretation of their own laws, and the like. Federal claimants, on the other hand, laud the enforceability and uniformity of federal law, the sanctity of the federal forum, the superiority of life-tenured judges, and the rest. There is no readily apparent way to reconcile these competing interests by principle. Federal courts law is a battlefield. It has been so for 200 years. It will likely remain so for a good time to come.

By drawing arbitrary lines between cases that are essentially alike, as with the categorizations occurring in such cases as *Monroe v. Pape*[104] and *Younger v. Harris*,[105] the Court can accommodate conflicting interests without being unduly concerned with the sometimes awkward demands of principle.[106] The recent habeas cases suggest that the Court is inclined to give more weight to state interests in finality without abandoning the basic principle allowing federal relitigation of legal issues. Toward this end, it carves out classes of habeas petitioners and denies access. On occasion the Court seeks either to evade a controversial issue or to address an issue with unusual dispatch. So the justices have manipulated justiciability standards in order to deny review in *DeFunis v. Odegaard*,[107] and to expedite adjudication in *Duke Power Co. v. Carolina Environmental Study Group*.[108] The Court chooses among a variety of approaches to the review of state court judgments, depending on whether, at a given point in time, it seeks to avoid unnecessary constitutional decisions or take an active role in refashioning constitutional law. This is our history—whether for liberals or conservatives, activists or advocates of restraint. It is far from clear that this unwieldy process has served us poorly.

The central point behind stressing the way the argument for coherence varies depending on context and noting the benefits of incoherence is not to resolve the issue of how much coherence should count. It is to insist that, if Federal Courts scholars are to grasp and portray the reality of Federal Courts law, they must face that normative issue instead of taking the value of coherence

104. 365 U.S. 167 (1961).
105. 401 U.S. 37 (1971).
106. See Wells, 60 N.C. L. Rev. at 68-86 (cited in note 36).
107. 416 U.S. 312 (1974).
108. 438 U.S. 59 (1978).

for granted. Moreover, in addressing the normative issue they must not ignore the role of substance in the adjudication of jurisdictional issues. Under the pragmatic paradigm, the value of coherence is particularly strong only in circumstances where Hart & Wechsler's normative premise favoring jurisdictional policy is weak.[109]

Notice another consequence of the link between substance and coherence. Their relation means that the *kind* of coherence that may be required under the pragmatic paradigm will differ radically from the precepts favored by adherents of Hart & Wechsler. For example, if the proper scope of standing to sue is strictly a matter of jurisdictional policy, then in broad terms the debate over taxpayer standing should be about choosing between the principle that federal courts should be generally available to enforce federal law and the principle that the party seeking to assert standing needs to show a compelling need for judicial intervention. By recognizing the substantive theme in standing law, courts and scholars may refocus the debate, justifying taxpayer standing for Establishment Clause claims, while denying it for claims brought to enforce other constitutional provisions that create no personal constitutional rights.[110] In a similar vein, one

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109. Once again, it is necessary to pay close attention to context. Some parts of jurisdictional law bear more directly on substantive rights and obligations than others. Habeas rules that channel litigation to state courts, like the holding in *Stone v. Powell*, 428 U.S. 465 (1976), affect federal rights only to the extent federal courts would have resolved the issues differently. By contrast, habeas rules denying access to federal court in the event of procedural default in state court, see, e.g., *Murray v. Carrier*, 477 U.S. 478 (1986), have the effect of denying access to *any* forum for litigating federal claims. The pragmatic paradigm holds that incoherence is less tolerable in the procedural default context than in determining the scope of *Stone*.

Eleventh amendment rulings may determine not only whether suit may be brought in federal court, but whether suit may be brought at all. For it remains unclear whether state courts must allow plaintiffs with federal causes of action against state governments to bring them in state court. See *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). *McKesson* holds that state courts may not assert "equitable considerations" as a broad justification for refusing to order the state to refund unconstitutionally collected taxes. It remains to be seen whether a different result obtains when the asserted justification for refusing relief is "sovereign immunity" rather than "equitable considerations." See Low and Jeffries, *Federal Courts* at 955-56 (cited in note 29).

Under the pragmatic paradigm, the need for coherence in eleventh amendment law turns on how the issue left open in *McKesson* is resolved. The case for coherence would be compelling only if states are *not* obliged to open their courts to federal claims against state governments.

110. From a substantive perspective, then, *Flast v. Cohen*, 392 U.S. 83 (1968) (recognizing taxpayer standing to raise Establishment Clause challenges to congressional enactments); *United States v. Richardson*, 418 U.S. 166 (1974) (no taxpayer standing to enforce a constitutional provision requiring that government budgets be made public); and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (no citizen standing to enforce constitutional provision forbidding legislative officers from holding executive offices) may all be reconciled. The dubious case, in this view of taxpayer standing, is

might argue that considerations of jurisdictional policy generally support the *Younger* abstention doctrine, but that the especially strong substantive value of vindicating free speech rights justifies an exception for litigants seeking access to federal court to raise first amendment challenges to state laws.[111]

CONCLUSION

It is no wonder that Federal Courts scholars are unhappy. Our goal should be to pierce the rhetorical surface of judicial opinions, grasp the reality that lies beneath, and convey it to our readers. The function of a model is to help us in these endeavors and the test of its current value is not its pedigree but how well it serves us today. Hart & Wechsler's model of Federal Courts law no longer meets our needs. It departs too much from the reality of the cases to work as a descriptive model, and its normative premises are themselves contestable, if not downright weak in the Federal Courts context.

Hart & Wechsler is a casualty of thirty years of constitutional combat.[112] The subtle analysis of jurisdictional policy demanded by Hart & Wechsler proved unable to withstand assault by warring state and individual interests seeking substantive advantage on a jurisdictional battlefield. As a result, there is no longer a coherent body of jurisdictional law based primarily on principles of federalism and separation of powers, if there ever was one. Rather, the area is rife with arbitrary distinctions and confused doctrine, despite the best efforts of Legal Process scholars to help the Court impose order. Substantive considerations exercise a pervasive influence on jurisdictional doctrine, contrary to the Legal Process view that substantive implications should count only in extreme cases. What is more, the demise of the Hart & Wechsler paradigm is not necessarily a normative catastrophe. There are arguably good reasons to forego process values and jurisdictional policy in favor of more ad hoc decisionmaking and the pursuit of substantive goals by jurisdictional means.

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (denying taxpayer standing to challenge executive actions).

111. Legal Process scholars sometimes reach this result by other means. See, e.g., Martin H. Redish, *The Doctrine of* Younger v. Harris*: Deference in Search of a Rationale*, 63 Cornell L. Rev. 463, 486-87 & n.117 (1978).

112. Cf. William N. Eskridge, Jr. and Philip P. Frickey, *The Making of The Legal Process*, 107 Harv. L. Rev. 2031, 2049-51 (1994) (on how the breakdown of consensus in the sixties and seventies "revealed the limitations of legal process philosophy for the next generation").

Federal Courts scholars need a new paradigm for addressing allocational issues, one that better accounts for the Court's actions and that reflects the real differences between jurisdictional law and the law of primary rights and obligations. I know better than to presume that the pragmatic paradigm sketched in Part IV is the definitive answer to the torpor of contemporary Federal Courts scholarship. But at least it asks some of the right questions.